

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case Nos.: 12-O-11922 (12-O-13518;
)	12-O-14571;12-O-14867;
JASON ALLAN SMITH,)	12-O-15060)-DFM
)	
Member No. 237584,)	DECISION
)	
A Member of the State Bar.)	
)	

INTRODUCTION

Respondent **Jason Allan Smith** (Respondent) was charged here with ten counts of misconduct, involving five different client matters. The counts included allegations that Respondent willfully violated (1) Business and Professions Code¹ section 6106.3 (collecting advance fee for loan modification services in violation of section 2944.7) [four counts]; (2) rule 3-110(A) of the Rules of Professional Conduct² (failure to perform with competence); (3) section 6068, subdivision (m) (failure to respond to client inquiries) [two counts]; (4) rule 4-100(B)(3) (failure to render accounts of client funds); and (5) rule 1-320(A) (sharing legal fees with a non-

¹ Unless otherwise noted, all future references to section(s) will be to the Business and Professions Code.
² Unless otherwise noted, all future references to rule(s) will be to the Rules of Professional Conduct.

lawyer) [two counts]. During the latter portion of the trial, the State Bar asked that one of the two counts alleging a violation of rule 1-320(A) be dismissed.

With regard to the remaining nine counts, the court finds culpability and recommends discipline as set forth below.

PERTINENT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed in this matter by the State Bar of California on December 17, 2012. On January 7, 2013, Respondent filed his response to the NDC.

The matter was originally assigned to Judge Patrice McElroy of this court for handling. On January 3, 2013, the case was reassigned to the undersigned. On February 4, 2013, an initial status conference was held in the matter. At that time the case was given a trial date of April 16, 2013, with a four-day trial estimate.

On April 18, 2013, Respondent filed a motion to continue the trial due to a conflicting trial date in the superior court. No opposition being filed to the motion, the trial date was rescheduled to June 25, 2013.

Trial was commenced on June 25, 2013, and completed on July 9,³ followed by a period of post-trial briefing. The State Bar was represented at trial by Senior Trial Counsel Erin McKeown Joyce. Respondent was represented by Edward Lear of Century Law Group LLP.

³ Completion of the trial was delayed due to the need for counsel to redact private information, such as the Social Security numbers for various individuals, from their trial exhibits, before this court would receive them in evidence. Except for that issue, the evidentiary portion of the trial was completed on June 27, 2013.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact are based on Respondent's response to the NDC, the brief stipulation of undisputed facts previously filed by the parties, and the documentary and testimonial evidence admitted at trial.

Jurisdiction

Respondent was admitted to the practice of law in California on July 31, 2005, and has been a member of the State Bar at all relevant times.

Case No. 12-O-11922 (Roshankoohi)

On December 6, 2011, Salimeh Roshankoohi entered into a written fee agreement with Respondent "to attempt to resolve Client's dispute with Client's mortgage lender, relative to the trustee sale that has taken place on her home." That foreclosure sale had taken place on August 26, 2011. The fee agreement went on to specify:

Attorney shall attempt to resolve the dispute without litigation, through negotiation and other reasonable means, as necessary. If litigation becomes necessary, a separate written agreement will be required between Attorney and Client, and additional fees will be due under that agreement.

...

Client understands that Attorney is not attempting to obtain a loan modification for Client. Rather, Attorney is attempting to resolve Client's dispute by unwinding the Trustee's Sale of Client's home, or obtaining some other form of recovery, including but not limited to, monetary relief.

The Client shall not be entitled to a refund of any portion of his/her payment to the Attorney for any reason, including but not limited to, the Attorney's failure to obtain an outcome satisfactory to Client.

Roshankoohi read the above agreement at the time it was presented to her; understood it; and agreed to pay Respondent \$1,950 for the above services. She paid those fees on December

9, 2011. On the day before she paid the fee, she was notified that the new owner of her home was starting proceedings to evict her.

On December 13, 2011, possibly after contacting Chase by phone, Respondent sent a letter to Roshankoohi's prior lender, Chase, notifying Chase that Respondent had been retained by Roshankoohi to effect a rescission of the foreclosure sale and requesting Chase to voluntarily rescind the sale.

On the same day, December 13, 2011, the new owner of the house, U.S. Bank, filed an unlawful detainer action against Roshankoohi. On December 23, 2011, Roshankoohi sent an email message to Respondent, informing him that she had just learned from the San Diego Superior Court that she had been sued by the new owner. She indicated that she would forward to Respondent the documents that she had received.

After receiving from Roshankoohi the papers related to the unlawful detainer action, Respondent sent a second letter to Chase on December 29, 2011, complaining that he had received no response to his prior letter and that he had been unable to reach anyone within Chase "who claims enough responsibility to deal with the matter." The letter then went on to inform Chase that Roshankoohi was being evicted from her home, and it again requested Chase to rescind the prior sale without the need for litigation.

In January 2012, Respondent and Roshankoohi discussed whether she wanted to hire him to represent her in the unlawful detainer action. Respondent indicated that he would charge her \$5,000 to represent her in the action. At the same time, he explained to her that she essentially had no good defenses to the unlawful detainer action if the bank would not agree to rescind the foreclosure sale. Roshankoohi did not agree to hire him to represent her in the case. As a result,

Roshankoohi's default was entered in the case and, on February 2, 2012, she received an eviction notice, requiring her to vacate the house on February 8, 2012.

Respondent and Roshankoohi then discussed the situation. He had talked with Chase and the bank did not feel that it had done anything improper in processing the foreclosure sale. Respondent informed Roshankoohi that because there was no movement from the bank in rescinding the sale, there was essentially nothing that he could do to prevent her from being evicted. However, he offered to file an ex parte application for her to set aside the default, which might have the effect of delaying her eviction. Respondent then drafted an ex parte application to set aside the default, including a declaration for his own signature in which he stated that the default had been entered as a consequence of a miscommunication between him and Roshankoohi. Respondent then gave notice on February 7, 2012, to opposing counsel of his intent to file the ex parte application on the following day. He then failed to file the application. His inaction resulted from a decision by Roshankoohi that she did not want him to file the application.⁴

On February 8, 2012, Roshankoohi was evicted from her home. On March 23, 2012, after talking with the State Bar, she sent a letter to Respondent, terminating his services and requesting a full refund of all advanced attorney fees. Respondent did not respond to this request.

Count 1 – Rule 3-110(A) [Failure to Perform with Competence]

Rule 3-110(A) provides that an attorney “shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.”

⁴ Roshankoohi testified that Respondent had indicated that if he was successful in getting the bank to delay her having to move out of the house, he would ask her for more money.

Respondent was hired to take steps, short of filing litigation, to seek to secure a rescission of the prior foreclosure sale of Roshankoohi's home. He wrote two letters to the prior lender, Chase, seeking to motivate it to agreeing to voluntarily rescind the sale, and he had conversations with the bank as well. The State Bar presented no evidence that there was any legal basis to force the rescission of the foreclosure sale; nor was there any expert testimony that Respondent's efforts were deficient.

The essence of the State Bar's contention is that Respondent was obligated to become involved in the unlawful detainer action against his client. The evidence offered by the State Bar failed to provide clear and convincing evidence in that regard. The written retainer agreement, which Roshankoohi testified she had read and understood, was clear that Respondent had no obligation to engage in any litigation on her behalf without a new fee agreement. She also testified that, when Respondent discussed with her the possibility of a new fee agreement to handle the unlawful detainer action, she declined to agree to one. When Respondent offered to seek to delay temporarily the eviction, and even drafted the papers to do so, Roshankoohi did not authorize him to file them and so he did not do so.

There was much evidence that a representative of U.S. Bank was offering Roshankoohi money to agree to vacate her home. Roshankoohi also disclosed in passing during her testimony that she was talking directly with the attorneys representing U.S. Bank. While she denied accepting a "cash for keys" offer from the bank, her credibility at trial was poor⁵ and the State Bar's evidence regarding the circumstances of when and under what circumstances the eviction matter was resolved was less than persuasive.

⁵ Roshankoohi's testimony was frequently inconsistent and conflicting. Counsel for the State Bar frequently was required to resort to leading questions and the use of exhibits to change her prior answers.

This count is dismissed with prejudice.

Count 2 – Section 6068(m) [Failure to Respond to Client Inquiries]

Section 6068, subdivision (m), of the Business and Professions Code obligates an attorney to “respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.”

In this count the State Bar alleges that Respondent failed to respond to reasonable status inquiries by his client. This charge is based on the complaint by Roshankoohi that there was no communication between her and Respondent “from December 23, 2011 until early February 2012.” (NDC, ¶¶ 16-18.) The evidence at trial, including the testimony of Roshankoohi, failed to provide clear and convincing evidence supporting this charge.

Respondent represented Roshankoohi for approximately two months. Respondent’s testimony regarding his conversations with his client was credible and persuasive. During this time Roshankoohi talked repeatedly with Respondent and his staff about the status of the action. Roshankoohi acknowledged at trial that she had a conversation with Respondent about the unlawful detainer action during January 2012. During that conversation, he advised her of the merits of her poor position in the lawsuit but offered to represent her for \$5,000. She declined to have him do so.

This count is dismissed with prejudice.

Count 3 – Rule 4-100(B)(3) [Failure to Render Accounts of Client Funds]

Rule 4-100(B)(3) requires a member to “maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm

and render appropriate accounts to the client regarding them[.]” This obligation to provide an accounting also applies to advance fees received by the attorney. (*In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 952; *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 757-758.)

Roshankoohi demanded that her fees be returned to her. Rather than respond to this request with an accounting, Respondent chose to ignore the request. This failure to account constituted a willful violation by him of his obligations under rule 4-100(B)(3).

Case No. 12-O-13518 (Reed)

On or before May 11, 2011, Clay Reed (Reed) contacted Ken Cleaver of Fixed Rate Financial, Inc. about pursuing a loan modification of Reed’s mortgage with Bank of America. Cleaver indicated that Fixed Rate would provide the document preparation service of a loan modification package and subsequently recommended Respondent as the attorney to actually seek the loan modification from the bank.

On June 6, 2011, Reed signed an agreement with Fixed Rate to go forward with the document preparation services. As part of this contract, Fixed Rate agreed, “upon receipt of all information from Client and payment of the Services as provided herein, Fixed Rate Financial, Inc. shall promptly provide documentation to a third party law firm.” The agreement also stated, “[You] have the right to provide the documentation to a Law Firm we recommend or any Law Firm of your choice[.]” The fee owed to Fixed Rate for this work was stated in the contract to be \$3,650. (Exh. 17.)

On or before June 6, 2011, Cleaver had recommended Respondent as the attorney to handle the loan modification. On the morning of June 6, 2011, Cleaver sent an email to both Respondent and Reed, asking Respondent to indicate what Respondent needed. (Exh. 23, p. 49.)

There is no evidence that Respondent contacted Reed directly as a result of that email. Instead, later that same day, Reed received an email from Cleaver, stating that Cleaver would be meeting on the following day, June 7, 2011, with Respondent. Attached to the email were (1) the proposed agreement between Reed and Fixed Rate; (2) three fee agreements routinely used by Respondent with his loan modification clients; and (3) a document, on Respondent's letterhead, entitled "Client Authorization to Represent." Cleaver's email asked that Reed sign and return these attached documents, which Reed did that same day.

The fee agreements were numbered. Professional Services Agreement-1 stated that Respondent was being employed "to perform an analysis and review Client's mortgage and financial circumstances and recommend and prepare a strategy and course of action that Client may pursue in order to improve that situation with Client's lender." It provided for a fee of \$1,500. (Exh. 20, p. 1.) Professional Services Agreement-2 stated that Respondent was being employed to "prepare and submit a loan modification package to Client's mortgage lender." It also provided for a fee of \$1,500. (Exh. 19, p. 1.)⁶ Reed signed both of these two fee agreements and returned them to Cleaver via fax. He did not, however, pay any additional money to Cleaver, other than the \$3,650 called for by the Fixed Rate contract.

The "Client Authorization to Represent" form stated, inter alia, that Reed was authorizing Respondent, and his agents and employees, to have access to Reed's home loan information from Bank of America. The form also authorized Respondent to communicate with Bank of America "for the purposes of negotiating the terms of my (our) loan, making payments arrangements, or for any other purpose." (Exh. 18.) Reed signed this authorization form as well and returned it to Cleaver via fax.

⁶ Professional Services Agreement-3 was not made an exhibit during the trial.

Over a month later, Reed complained on July 7, 2011, via email to Cleaver, that he had heard nothing further from Cleaver about the loan modification.

On July 9, 2011, Cleaver replied via email that he was in Europe until July 20, but that he had spoken to Respondent on the prior day “and he informed me your file was fine and there was nothing he needed from you at the time.” (Exh. 23, p. 2.) Respondent was copied with this email.

Nearly a month later, Reed again emailed Cleaver on the evening of August 2, 2011, asking for a status report. Early the following morning, Cleaver forwarded the email to Respondent, asking Respondent to “kindly send Clay Reed an update.” (Exh. 23, p. 3.) Respondent failed to do so.

On August 9, 2011, Reed sent an email directly to Respondent, complaining of the lack of any response to his requests for a status report: “Jason, Ken said you could give me an update. I was wondering what kind of time line are [we] dealing with? It has been two months. Is this typical?” Within a few minutes of this email being sent, Respondent responded to Reed with an email, indicating that he would give Reed a phone call: **“Can you give me the best phone number to reach you on? I’ll give you a call and go over a couple items [sic] we need, and provide status.”** (Exh. 23, p. 5 [emphasis added].) Although Reed almost immediately returned his phone numbers via email, Respondent then never called him.

Three days later, Reed sent Respondent another email, asking that Respondent provide an email response to his questions, since the “Phone doesn’t deem [sic] to be working.” (Exh 23, p. 7.) He received no response from Respondent.

On August 16, 2011, Reed sent another email to Respondent, again asking for a response to his questions. He again forwarded his phone numbers and indicated that response could be by either phone or email. He received neither.

Three weeks later, on September 9, 2011, Reed again emailed Respondent, this time copying Cleaver as well. (Exh. 23, p. 9.) In this somewhat more heated email, he complained:

Jason, I'm not one for being a squeaky wheel, however that time may be here. It has been a month since I sent my phone numbers and over four months since this process started. I have no idea what is going on other than I sent a lot of personal information and paid in full what was requested. Just a simple acknowledgement would be appreciated. Please respond soon."

Within an hour, Cleaver responded via email with the comment, "Let me know when you get a return call."

Ten days later, on September 19, 2011, Reed sent Cleaver an email, complaining that he had still not received any response from Respondent. Respondent was not copied by Reed with this email. However, early the next day, September 20, 2011, Cleaver forwarded the email to Respondent and to Respondent's office assistant (Jennifer). The email string forwarded to them both included Respondent's email of August 9, in which Respondent indicated that he would call to go over a couple of items and provide a status report. (Exh. 23, pp. 13-14.) Neither Respondent nor his assistant responded to receiving this email by contacting Reed.

On October 3, 2011, Reed again complained to Cleaver about the lack of any response. Cleaver quickly replied by stating, "All of you [sic] questions below relate to Jason Smith, the Attorney you signed an agreement with. I understand your frustration and I also know that Jason Smith has been working extremely hard on your file and would be more than happy to discuss your concerns below." (Exh. 23, p. 17.) Cleaver copied Respondent with this email.

Nonetheless, Respondent did not contact Reed as a result of it, either to provide a status report or to deny the statements made by Cleaver in it.

After not hearing from Respondent for another three days, Reed sent an email directly to Respondent:

Jason, Ken says you have been working very hard on our modification, and since we have a signed agreement with you, we should now direct any questions to you. How is it going. [sic] Did you get answers to the questions you had two months ago? Let me know if you have any more questions, and please update us on your progress.

(Exh. 23, p. 18.)

More than a month later, neither Respondent nor his office had responded to any of Reed's inquiries. On November 7, 2011, Reed again sent an email to both Respondent and Cleaver, complaining of the situation: "I'm not sure how to even ask what's going on with our modification. Eight months and I got no idea what's happening." (Exh. 23, p. 19.) Within two hours after this email was sent, Cleaver replied to it: "I meet with Jason weekly and I know he is working your file. Please advise me once you receive a response." (Exh. 23, p. 20.) Cleaver, however, did not copy Respondent with his email.

On January 20, 2012, more than two months after Reed's last email, he again sent an email to Cleaver, asking for Cleaver's assistance in getting a status response from Respondent: "Ken, I have never heard from Jason, not a peep. Since you see him weekly, could you please encourage him to contact me with an update. I'll keep you abreast of any communication or lack there of [sic]." (Exh. 23, p. 21.) Cleaver almost immediately replied by email that he had asked Respondent to update Reed. He also advised Reed to email either Respondent or his assistant,

Jennifer, to request an update. (Exh. 23, p. 22.) Reed sent Respondent such an email the following day. (Exh. 23, p. 23.)⁷ Nonetheless, he continued to hear nothing from Respondent.

On January 30, 2012, Reed again sent an email to both Respondent and Cleaver, urgently requesting an update: “Where do I stand on this modification? Will someone fill me in as to what is going on! The boat is taking on water here! I need to know if I have to take other measures.” (Exh. 23, p. 24.) Again, Cleaver almost immediately acknowledged receiving the email, but neither copied Respondent with his acknowledgement nor provided Reed with any sort of update. (Exh. 23, p. 25.)

On February 8, 2012, Reed emailed Cleaver to state that he had still not received any word from Respondent. Cleaver responded that same day via email, stating that he would “email and call Jason right away.” (Exh. 23, p. 27.)

A month later, Reed had still not heard from Respondent. On March 14, 2012, he complained again via email to both Respondent and Cleaver of that fact:

Ken, I’ve called Jason’s office and still no response. Don’t know how to get and [sic] answer from either of you! As a business owner, I know this is not how business is conducted. You can not stay in business without speaking to your clients! This leads me to believe that 1) your [sic] in over your head on what you can perform or 2) you are a con. Either one of you could have put my concerns to rest with a simple update, months ago! Ball’s in your court now as to what I do next. Hope to hear from you soon.

(Exh. 23, p. 28.)

Once again, Cleaver responded almost immediately to the email. In his response, he indicated that his office was not responsible for the problem, because Reed’s contract with Fixed Rate was only for document preparation, which had been performed. He then went on to state, “I

⁷ There is no evidence that Reed sent a separate request for an update to Jennifer, and it is unclear whether he did so.

do apologize if you are not getting a reply from his office in what you think is a timely manner. I believe Jason is working hard on your file. He rarely contacts a client unless there is something new to update the client on, this does not mean he is not working your file.” (Exh. 23, p. 29.)

Cleaver did not copy Respondent with this email.

On the following day, March 15, 2012, Reed sent another email to both Respondent and Cleaver. In it he complained again about not receiving a simple status report. In addition, he indicated that he had recently been injured and was now unable to work. He expressed concern that his inability to work made his situation urgent and asked for guidance regarding several specific issues. (Exh. 23, p. 30.) Two weeks later, having heard nothing further from either Respondent or Cleaver, he sent another email in protest. (Exh. 23, p. 31.) Once again, Cleaver sent a quick email (not copied to Respondent) that Reed needed to address his concerns to Respondent, which Reed of course had done. Reed responded by complaining that Cleaver had been responsible for Respondent working on the matter, inquired whether it was possible to have another attorney do the work, and asked that Cleaver send an email to Respondent, requesting an update. (Exh. 23, pp. 33-34.)

On April 11, 2012, Reed sent an email to both Cleaver and Respondent, stating that he had contacted Bank of America and had been informed that there had been no contact with it regarding a loan modification. He then demanded a full refund within 24 hours. He also indicated that he was contacting the District Attorney regarding the matter. (Exh. 23, p. 35.)

In fact, Reed had already contacted the District Attorney’s office. At trial, Reed stated that all of his inquiries this date were fed to him by the District Attorney’s office and that Reed understood his role that day merely to be relaying the inquiries formulated by the District Attorney’s office and then reporting the responses back to the District Attorney’s representative.

Within 10 minutes of Reed's email, Respondent replied via email, with a copy going to Cleaver as well. In this email, sent from Respondent's iPhone, Respondent acknowledged that he was aware that his retainer agreement had previously been provided to Reed, but Respondent now claimed that he had never agreed to represent Reed:

I cannot contact your lender or represent you until you retain me to do so, and sign an authorization to that effect. To date, you have not retained me, although you were sent my retainer agreement long ago.

If I am missing something, or you sent my retainer in, and I missed it, then please let me know.

I have represented thousands of individuals in modification. But, they have to retain me to do so. I am very happy to move quickly on yours, but I must have you sign and my retainer and authorization.

What phone number can you be reached on?

(Exh. 23, p. 36.)

Reed responded to this email within 30 minutes, at 10:05 a.m., by informing Respondent that the authorization had been returned on June 6, 2012. Reed then inquired whether the \$3,650 had been received. This email was directed by Reed also to Cleaver.

(Exh. 23, p. 37.)

At 10:16, Respondent responded to Reed's email, again via an email message from Respondent's iPhone:

I did not receive the authorization. What fax number did you send that to? What about my retainer agreement?

I don't charge \$3650. I'm guessing the \$3650 was to Ken for his services, and you agreed with Ken that he would cover my fees for you?

Can we talk? Might be easier to clear up if we talk.

(Exh. 23, p. 38.)

After receiving this email message from Respondent, Reed almost immediately replied, with a copy going to Cleaver as well: “Did Ken pass the \$3650 on to you or any part of it?”

(Exh. 23, p. 39.)

At 10:38 a.m., Respondent responded, via email sent on his iPhone:

No. I have to be retained and perform services before I am paid. But he normally covers the fees when that happens, depending on your agreement with him.

(Exh. 23, p. 40.)

Minutes later, at 10:43 a.m., Respondent sent an email message to Cleaver, with a copy to Reed:

Clay, do you have record of sending my retainer agreement? I’d like to find out if my staff or I dropped the ball in some way.

What phone number can you be reached on?

(Exh. 23, p. 41.)

At 3:47 p.m., more than five hours later, Reed received an email message from Cleaver. Respondent was not visibly copied with the message. In it, Cleaver stated: “Jason Smith is out of the office as well today. Jason left voicemails on two of your numbers, trying to help you. Please send him an email today, stating when he can call you and which number.”

At the instruction of the District Attorney’s office, Reed did not follow-up on Respondent’s invitation to discuss the matter over the phone. In addition, when Reed was asked by this court whether he ever forwarded to Respondent a copy of the signed retainer agreement after receiving Respondent’s email of April 11, 2012, Reed stated that he had not, again based on the advice of the District Attorney’s office.

Count 4 –Section 6106.3 [Collection of Advanced Fees for Loan Modification Services]⁸

Section 6106.3 states that an attorney’s violation of Civil Code section 2944.7 constitutes cause for the imposition of discipline. Civil Code section 2944.7(a)(1) states that “it shall be unlawful for any person who negotiates, attempts to negotiate, arranges, attempts to arrange, or otherwise offers to perform a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation paid by the borrower, to do any of the following: [¶] (1) Claim, demand, charge, collect, or receive any compensation until after the person has fully performed each and every service the person contracted to perform or represented that he or she would perform.”

The State Bar alleges that Respondent violated section 2944.7 by collecting an advanced fee to perform mortgage loan modification services on behalf of Reed.

The evidence fails to establish a violation by Respondent of section 2944.7. As correctly stated by counsel for the State Bar in requesting that Count 5 be dismissed, the evidence fails to show that Respondent received any portion of the money paid by Reed to Fixed Rate. While Reed testified that he understood that Fixed Rate would receive only \$650 of the \$3,650 paid by him, that understanding is contrary to the language of the Fixed Rate contract, and there is no evidence that any funds were actually paid to Respondent.

There is also no evidence that Respondent claimed, demanded, charged, collected, or received any compensation – prerequisites for any finding of a violation of section 2944.7. Moreover, there is insufficient evidence to show that Respondent charged or sought to collect an

⁸ Although the normal burden of proof in a State Bar disciplinary proceeding is “clear and convincing evidence,” where the allegation, as here, is that Respondent violated a criminal statute, this court will use the more rigid standard of “proof beyond a reasonable doubt” in making a finding of culpability. (See *In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 903, fn. 11.)

advance fee for loan modification services. While Reed signed two fee agreements with Respondent's office, neither of them required a fee to be paid in advance and the second agreement was explicit in stating that no advance fee was owed.

Accordingly, this count is dismissed with prejudice.

Count 5 – Rule 1-320(A) [Sharing Legal Fees with Non-Lawyer]

The NDC originally charged Respondent with sharing legal fees with a non-lawyer. At the end of its case-in-chief on issues of culpability, the State Bar asked that this count be dismissed due to the absence of evidence that Respondent had received money as a result of his dealings with the Reed matter. To formalize this court's oral order at that time, this count is dismissed with prejudice.

Count 6 – Section 6068(m) [Failure to Respond to Client Inquiries]

As previously noted, section 6068, subdivision (m), of the Business and Professions Code obligates an attorney to "respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

Reed began making reasonable status inquiries to Respondent in August 2011. Although Respondent was admittedly aware of the request for an update by at least August 9, 2011, he failed completely to ever provide one. Moreover, he subsequently failed to even acknowledge Reed's many requests for a status report until April 11, 2012, when Reed demanded a refund and indicated that he was going to the District Attorney's office.

Respondent, both in his April 2012 email and at trial, stated that he never represented Reed and, therefore, had no duty to provide any status report. This contention by Respondent lacked credibility. Respondent acknowledged being aware that retainer agreements had been

forwarded to Respondent in his email of April 11, 2012; he acknowledged representing and working on Reed's behalf in his email of August 9, 2011; and he promised in that email to provide the requested status report. He just then failed thereafter to follow-up with the promised telephone call – or at all.

Respondent also contends that he was able to avoid representing Reed, and other individuals signing one of his retainer agreements, by withholding signing the document himself. Until he signs the agreement, he testified, he is not in privity of contract with the party.

There is nothing in the Respondent's loan modification fee agreements stating that Respondent has no duty to provide services under the agreement or is not in an attorney-client relationship with the other party until after Respondent signs the fee agreement. Given that Reed had signed and returned the fee agreements and Respondent had represented in his email that he was acting as Respondent's attorney, Respondent's contention to the contrary is contrary to established case law and lacks merit. (See instead *Lister v. State Bar* (1990) 51 Cal.3d 1117, 1126; *Davis v. State Bar* (1983) 33 Cal.3d 231, 237 [“No formal arrangements are necessary to establish an attorney-client relationship especially where the existence of the relationship is demonstrated and reinforced by the attorney's own conduct”]; *Farnham v. State Bar* (1988) 17 Cal.3d 605, 612; *Streit v. Covington & Crowe* (2000) 82 Cal.App.4th 441, 444.)

Respondent, by failing for months to respond to Reed's request for a status report, willfully violated his obligations under section 6068, subdivision (m).

Case No. 12-O-14571 (McDonald)

In August 2011, Steve McDonald, after unsuccessful trying several times to secure a home loan mortgage modification himself, decided to seek help in securing a loan modification from his lender, Citimortgage. On August 1, 2011, on the recommendation of a co-worker,

McDonald hired Trivine Solutions (Trivine) for assistance in obtaining a residential mortgage modification. Trivine is not a law firm and is not operated by an attorney licensed in California. In hiring that firm, McDonald was informed by Trivine that it would review and analyze his information and that they had an attorney who would then represent McDonald with the lender. On the same day that McDonald hired Trivine, he paid Trivine \$1,450.

McDonald understood that Trivine was going to analyze his documents related to McDonald's home mortgage loan and then refer him an attorney, recommended by Trivine, to go forward in seeking a loan modification agreement on McDonald's behalf. Of the \$1,450 paid by McDonald to Trivine, McDonald was informed by Trivine that \$1,000 of that \$1,450 amount would be sent to the attorney to pay for the cost of that attorney.

Consistent with Trivine's representations to McDonald, Trivine referred McDonald's matter to Respondent for further handling. McDonald was then contacted by Jennifer Lee, a representative of Respondent's firm, and he was subsequently sent by email two documents for execution: a fee agreement designated "Professional Services Agreement-1" and a form "Client Authorization to Represent." McDonald executed both documents on September 23, 2011.

With regard to the scope of services to be provided by Respondent pursuant to the agreement, the fee agreement provided:

Client employs Attorney's services to perform an analysis and review of Client's mortgage and financial circumstances, and recommend and prepare a strategy and course of action that Client may pursue in order to improve that situation with Client's lender. This may include one or more of the following:

- a) Preparation of a forensic audit on Client's behalf,
- b) Review of loan audit prepared by a third party, if applicable,
- c) Preparation of opinion regarding the consequences of audit findings,
- d) Analysis of Client's finances and ability to pay, including analysis of how Client's mortgage lender is likely to view his/her prospects for loan modification or short sale,

- e) Assessment of qualification for government loan modification programs, as well as review of whether Client may qualify for that lender's internal, non-governmental loan modification programs.

With regard to the cost of the services to be provided under the agreement, the contract stated:

Client shall pay Attorney \$1000 for the services described in paragraph one. Attorney's representation is limited to only those services listed in paragraph 1, and terminates upon the completion of those services. Attorney's fees are non-refundable, regardless of whether Attorney's services result, either directly or indirectly, in an eventual modification of Client's mortgage loan. If further services become necessary, a separate written agreement must be made, and additional fees will be required. Nothing in this agreement shall require Client to retain Attorney for additional services, including the negotiation or arrangement of a loan modification on Client's behalf.

At the time that McDonald received the forms on September 23, 2011, he emailed Lee to confirm that the \$1,000 fee set forth in the fee agreement "has already been paid to you with the \$1,450 paid to [Trivine]." In a reply email to McDonald on September 26, 2011, Lee confirmed that it had.

The "Client Authorization to Represent" form provided:

(We) hereby authorize Jason A. Smith, Attorney at Law, and his agents and employees, to access any and all information related to my (our) home loan with the above-mentioned lender. This includes, but is not limited to, my (our) payment history on the above-mentioned loan, payment dates, interest rate information, amount of principle balance, amount of delinquency, and anything else pertinent to the handling of my (our) loan.

This shall also include the authority to communicate, either verbally or in writing, with my (our) above-referenced lender, it's [sic] agents and employees, and it's [sic] partners, affiliates, vendors, or any other party with responsibility for my (our) above-referenced loan, **for the purposes of negotiating the terms of my (our) loan, making payment arrangements**, or for any other purpose.

(Exh. 27 [emphasis added].)

Despite the language of the fee agreement and consistent with the client authorization request, the services actually provided by Respondent's office make clear that both McDonald and Respondent understood that his office was going to assist McDonald in seeking to arrange a loan modification for McDonald, not merely do an analysis of his potential for getting such a modification. In the first instance, McDonald testified, without contradiction, that the analysis work was to be done by Trivine. For that service, Trivine was paid \$450 of the \$1,450. Second, there is no evidence that either Respondent or his office prepared a loan audit for McDonald, provided him with either a written or oral analysis of his financial condition or suitability for a loan modification, or provided any of the other services described in the fee agreement, quoted above. Instead, Respondent's office, as reflected in its file, Conversation Log (Exh. 39), and communications with the lender, promptly undertook to secure a loan modification for McDonald.

Unfortunately, the efforts by Respondent's office to secure a loan modification proved to be unsuccessful. On December 16, 2011, McDonald received an email message from Respondent's office, informing him:

We called your lender and spoke with Ms. Jeffords, the representative assigned to the account. She has confirmed at this time the lender has denied you for all possible workout options. . . . [¶] Unfortunately, there is nothing we can do about your denial.

Eleven days after receiving the word that the efforts of Respondent's office to secure a loan modification had been unsuccessful, McDonald sent an email to Respondent's office and Trivine on December 27, 2011, demanding that they refund all of the fees he had previously paid for their services: "Requiring this fee in advance is in violation of California Law, the State Bar 94 Calderon. I demand repayment forthwith."

On the following day, Respondent replied with an email, denying that he had been paid “any advance fee,” although acknowledging that he had received some payment for his services. To date, Respondent has failed to provide any refund to McDonald.

Count 7 –Section 6106.3 [Collection of Advanced Fees for Loan Modification Services]

The State Bar alleges that Respondent’s conduct in the above matter violated section 2944.7. This court agrees.

As previously noted, section 6106.3 states that an attorney’s violation of Civil Code section 2944.7 constitutes cause for the imposition of discipline. Civil Code section 2944.7, subdivision (a)(1) states, in pertinent part: “[It] shall be unlawful for any person who negotiates, attempts to negotiate, arranges, attempts to arrange, or otherwise offers to perform a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation paid by the borrower, to do any of the following: (1) Claim, demand, charge, collect, or receive any compensation until after the person has fully performed each and every service the person contracted to perform or represented that he or she would perform.”

Despite the limited language of the fee agreement entered into by McDonald, Respondent, through his agents, represented to McDonald, both by words and conduct, that Respondent would seek a loan modification on McDonald’s behalf, and that is precisely what work was done on McDonald’s behalf. Respondent had collected his fee for that work prior to the work being performed and completed. That conduct constituted willful violations of the prohibitions of Civil Code section 2944.7 and of Business and Professions Code section 6106.3.

Count 8 – Rule 1-320(A) [Sharing Legal Fees with Non-Lawyer]

Rule 1-320(A) provides in pertinent part, “Neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer[.]”

The State Bar alleges that Respondent's receipt of his fee from the Trivine office constituted a violation of rule 1-320(A). This court disagrees. There is no evidence that Trivine shared in any portion of the money that McDonald paid as attorney fees. The fact that the fees were paid by the client to the attorney through a third-party intermediary does not constitute improper sharing of legal fees.

This count is dismissed with prejudice.

Case No. 12-O-14867 (Shanks)

In December 2011, Kelly Shanks was referred to Respondent for assistance in seeking a loan modification. After receiving word of her interest in hiring him, Respondent sent via email a letter to Shanks, setting forth his fee arrangement and providing her with three separate contracts to execute.

In Respondent's letter, he described his fee structure as follows:

1. \$1000 for initial review, preparation, analysis, etc.
2. \$2000 for submission and negotiation of modified loan terms, based on the audit that has been presented to me, your financials, etc. That fee is broken up into two monthly payments.
3. \$1000 when it is complete.

At this time, only \$1000 is due, if you retain me. You will not begin paying on the second agreement until the second month, although my services for that agreement will be performed much sooner than that.

(Exh. 46 [emphasis in original].)

As previously noted, Respondent's fee agreements were numbered in sequence. Professional Services Agreement-1 stated that Respondent was being employed "to perform an analysis and review Client's mortgage and financial circumstances and recommend and prepare a strategy and course of action that Client may pursue in order to improve that situation with Client's lender." It provided for the fee of \$1,000, described

above. (Exh. 42, p. 1.) Professional Services Agreement-2 stated that Respondent was being employed to “prepare and submit a loan modification package to Client’s mortgage lender.” It provided for a fee of \$2,000. However, contrary to the language of the letter quoted above, the agreement stated, “**The Client shall not be required to pay Attorney, as required by paragraph 3, until Attorney fully performs his services to Client.**”

(Exh. 43, p. 1 [emphasis in original].) Professional Services Agreement-3 stated that Respondent was being employed “to attempt to negotiate a loan modification with Client’s mortgage lender.” (Exh. 44, p. 1.) Once again, the contract provided that the fee would not be owed until Respondent had fully performed his services.

Shanks signed all three contracts on December 21, 2011, and returned them to Respondent. On the same date, pursuant to the first contract and the instruction in Respondent’s email, she paid the \$1,000 owed under the first contract.

Shanks was initially unhappy with the services being provided by Respondent and complained to the State Bar. She and Respondent subsequently repaired their relationship and he is continuing to represent her in seeking a loan modification. The only money she has paid him to date for his efforts is the original \$1,000.

Count 9 –Section 6106.3 [Collection of Advanced Fees for Loan Modification Services]

The State Bar alleges that Respondent’s conduct in collecting the \$1,000 in conjunction with the first of the three contracts violated Civil Code section 2944.7. This court agrees.

As previously noted, section 2944.7 prohibits any person, who offers to perform a mortgage loan modification for a fee or other compensation paid by the borrower, from charging, collecting, or receiving any compensation “until after the person has fully performed each and every service the person contracted to perform or represented that he or she would perform.” At

the time that Respondent charged and collected the \$1,000 under the first contract, he had represented to Shanks, and contracted with her, that he would seek to secure a loan modification for her, and he had not yet performed all of those services. That conduct constituted willful violations of the prohibitions of Civil Code section 2944.7 and of Business and Professions Code section 6106.3.

Case No. 12-O-15060 (D'Amico)

In October 2011, Barbara D'Amico was referred to Respondent's office for possible assistance with regard to the mortgage on rental property owned by her. In discussions with Respondent and in a letter dated October 31, 2011, D'Amico was informed before she retained Respondent that he used a three contract approach to handling possible loan modification work. Under the first contract, Respondent's office would provide a review of D'Amico's financial condition and provide her an analysis of how she should proceed. The cost of this first contract was \$1,000, payable in advance. She was told by Respondent that this \$1,000 was for the purpose of his providing her with an analysis of her situation. If she desired to go forward with a loan modification, there would be a second agreement, with an additional cost of \$2,000, with a deferred due date of the payment. As stated in the letter of October 31, 2011, "You will not begin paying on the second agreement until the second month, although my services for that agreement will be performed much sooner than that."

On November 22, 2011, D'Amico signed the first contract and paid the advance fee of \$1,000. Soon thereafter, Respondent wrote a letter to D'Amico in which Respondent expressed the opinion that the prospects of D'Amico successfully securing a loan modification or pursuing litigation against the lender were not good. Instead, Respondent recommended that D'Amico consider filing bankruptcy. After Respondent had provided this analysis, D'Amico then filed a

bankruptcy petition on her own. She made no effort on her own to seek a loan modification before doing so.

At no time did Respondent provide D'Amico with a copy of a second fee agreement; he did not have her execute an authorization for his office to contact her lender; no representation was made to D'Amico that either Respondent or his office would seek to negotiate or arrange a loan modification or loan forbearance; his office, in fact, made no attempt to secure any loan modification for D'Amico; and D'Amico never paid any portion of the \$2,000 fee that she had been informed would be required if she wished Respondent to seek such a loan modification.

Count 10 –Section 6106.3 [Collection of Advanced Fees for Loan Modification Services]

Respondent is charged in this count with violating Civil Code section 2944.7. The evidence, however, failed to show any such violation, whether judged by either the “clear and convincing” or “beyond a reasonable doubt” standards of proof. While it is undoubtedly true that D'Amico desired to obtain a loan modification, that intent is not the determinative fact in assessing whether an attorney has violated the statute. Here the attorney did not contract to provide services falling within the ambit of the statute, represented that such services would not be provided unless there was a new fee agreement, and did not provide any of such services.

The sole factual basis alleged by the State Bar in the NDC, for its allegation that Respondent's conduct violated Civil Code section 2944.7, is the following: “Barbara D'Amico hired Respondent for services related to a loan modification.” (NDC, ¶ 58.) This court declines to interpret the prohibition of the statute to be so expansive.

This count is dismissed with prejudice.

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b).)⁹ The court finds the following with regard to aggravating factors.

Multiple Acts of Misconduct

Respondent's multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).)

Respondent has been found culpable of four counts of misconduct in the present proceeding, involving four different clients. The existence of such multiple acts of misconduct is an aggravating circumstance. (Std. 1.2(b)(ii).)

Significant Harm

Respondent charged prohibited up-front fees for loan modification services from individuals in financial need. He has failed to provide full refunds of these fees. This is an aggravating circumstance. (*In the Matter of Taylor* (Review Dept. 2012) 5 Cal. State Bar. Ct. Rptr. 221, 235.)

Indifference/Lack of Remorse

Respondent continues to dispute the inappropriateness of his fee arrangement under section 2944.7. As explained by the Review Department in its recent *Taylor* decision, this is a significant aggravating circumstance. (*In the Matter of Taylor, supra*, 5 Cal. State Bar Ct. Rptr. at p. 235.)

⁹ All further references to standard(s) or std. are to this source.

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).) The court finds the following with regard to mitigating factors.

No Prior Discipline

Respondent was admitted to practice in July 2005 and has no prior record of discipline. Because the misconduct here occurred shortly after he had been in practice for just six years, this is not a mitigating circumstance. (*Kelly v. State Bar* (1988) 45 Cal.3d 649, 658.)

Character Evidence/Community Service

Respondent presented testimony at trial of his good character and of his commitment to community and church activities from several highly reputable witnesses. (*In the Matter of Lybbert* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 297, 305 [volunteer community and church work, counseling people in crisis.]; see also *In the Matter of Crane and DePew* (Review Dept 1990) 1 Cal. State Bar Ct. Rptr. 139, 158.)

Good Faith/Advice of Counsel

Respondent contends that he should be given mitigation credit with regard to his violations of section 2944.7 because he relied on the advice of counsel in his activities. This court declines to so find.

Respondent's conduct was contrary to the clear and unambiguous language of section 2944.7. Moreover, the evidence offered by Respondent in support of his contention that he relied on the advice of attorneys in ignoring that language consisted solely of his passing comments to that effect. He cited to no opinion letter from any other attorney, there was no testimony that another attorney had approved the specific practices or fee agreements that

Respondent employed, and no other witness appeared to testify regarding any advice that had been given by that individual to Respondent. (Cf. *In the Matter of Taylor, supra*, 5 Cal. State Bar Ct. Rptr. at p. 232.)

DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, preserve public confidence in the profession, and maintain the highest possible professional standards for attorneys. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Although the standards are not binding, they are to be afforded great weight because “they promote the consistent and uniform application of disciplinary measures.” (*In re Silvertown* (2005) 36 Cal.4th 81, 91-92.) Nevertheless, the court is not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, the court is permitted to temper the letter of the law with considerations peculiar to the offense and the offender. (*In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 994; *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) In addition, the court considers relevant decisional law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions. In the present proceeding, the most severe sanction for Respondent's misconduct is found in standard 2.2(b)¹⁰ and 2.6. Standard 2.2(b) provides: "Culpability of a member of commingling of entrusted funds or property with personal property or the commission of another violation of rule 4-100, Rules of Professional Conduct, none of which offenses result in the wilful misappropriation of entrusted funds or property shall result in at least a three month actual suspension from the practice of law, irrespective of mitigating circumstances." Standard 2.6 provides that culpability of a member of a violation of certain specified sections of the Business Code shall result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline set forth in standard 1.3.¹¹ The specified sections include section 6068.

The State Bar contends that the appropriate discipline for Respondent's misconduct here should be a 90-day actual suspension.

This court agrees. Respondent's misconduct involved numerous individuals, repeated violations of Civil Code section 2944.7, harm to financially vulnerable individuals, and a violation of rule 4-100. He continues to lack insight into the wrongfulness of his conduct. While

¹⁰ In the State Bar's closing brief, it states that standard 2.2 is inapplicable, because it "deals with trust account violations." This court disagrees. (See *In the Matter of Fonte, supra*, 2 Cal. State Bar Ct. Rptr. at pp. 764-765.)

¹¹ Standard 1.3 provides: "The primary purposes of disciplinary proceedings conducted by the State Bar of California and of sanctions imposed upon a finding or acknowledgement of a member's professional misconduct are the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys[;] and the preservation of public confidence in the legal profession. Rehabilitation of a member is a permissible object of a sanction imposed upon the member but only if the imposition of rehabilitative sanctions is consistent with the above-stated primary purposes of sanctions for professional misconduct."

the Review Department in the *Taylor* matter, cited above, recommended that Swazi Taylor receive a six-month actual suspension for his misconduct in that matter, all parties here agree that the misconduct and harm here is more limited than that involved there. Accordingly, a 90-day period of actual suspension is in accordance with both the standards and with prior cases.

RECOMMENDED DISCIPLINE

Recommended Suspension/Probation

For all of the above reasons, it is recommended that **Jason Allan Smith** be suspended from the practice of law for one year; that execution of that suspension be stayed; and that Respondent be placed on probation for two years, with the following conditions:

1. Respondent must be actually suspended from the practice of law for the first ninety (90) days of probation.
2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all the conditions of this probation.
3. Respondent must maintain, with the State Bar's Membership Records Office and the State Bar's Office of Probation, his current office address and telephone number or, if no office is maintained, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a).) Respondent must also maintain, with the State Bar's Membership Records Office and the State Bar's Office of Probation, his current home address and telephone number. (See Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondent's home address and telephone number will not be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.

4. Within thirty (30) days after the effective date of discipline, Respondent must contact the Office of Probation and schedule a meeting with Respondent's assigned probation deputy to discuss these terms and conditions of probation and must meet with the probation deputy either in-person or by telephone. During the period of probation, Respondent must promptly meet with the probation deputy as directed and upon request.
5. Respondent must report, in writing, to the State Bar's Office of Probation no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which Respondent is on probation (reporting dates).¹² However, if Respondent's probation begins less than 30 days before a reporting date, Respondent may submit the first report no later than the second reporting date after the beginning of his probation. In each report, Respondent must state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

(a) in the first report, whether Respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and

(b) in each subsequent report, whether Respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation during that period.

During the last 20 days of this probation, Respondent must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, Respondent must certify to

¹² To comply with this requirement, the required report, duly completed, signed and dated, must be received by the Office of Probation on or before the reporting deadline.

the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

5. Subject to the proper or good faith assertion of any applicable privilege, Respondent must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to Respondent, whether orally or in writing, relating to whether Respondent is complying or has complied with the conditions of this probation.
6. Within one year after the effective date of the Supreme Court order in this matter, Respondent must attend and satisfactorily complete the State Bar's Ethics School and provide satisfactory proof of such completion to the State Bar's Office of Probation. This condition of probation is separate and apart from Respondent's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, Respondent is ordered not to claim any MCLE credit for attending and completing this course. (Rules Proc. of State Bar, rule 3201.)
7. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter.
8. At the termination of the probation period, if Respondent has complied with all of the terms of his probation, the two-year period of stayed suspension will be satisfied and the suspension will be terminated.

MPRE

It is further recommended that Respondent be ordered to take and pass the Multistate Professional Responsibility Examination within one year after the effective date of the Supreme Court order imposing discipline in this matter and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period. (See *Segretti v. State*

Bar (1976) 15 Cal.3d 878, 891, fn. 8.) Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

Rule 9.20

The court recommends that Respondent be ordered to comply with California Rules of Court, rule 9.20, and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.¹³

Costs

It is further recommended that costs be awarded to the State Bar in accordance with section 6086.10 and that such costs be enforceable both as provided in section 6140.7 and as a money judgment. It is also recommended that Respondent be ordered to reimburse the Client Security Fund to the extent that the misconduct in this matter results in the payment of funds and that such payment obligation be enforceable as provided for under Business and Professions Code section 6140.5.

Dated: October _____, 2013

DONALD F. MILES
Judge of the State Bar Court

¹³ Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or contempt, an attorney's failure to comply with rule 9.20 is also, *inter alia*, cause for disbarment, suspension, revocation of any pending disciplinary probation, and denial of an application for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d).)